

1715. February 2. OGILVIE of Murthil *against* LESLY of Glaswell.

No 2.

A person disposed with warrandice from his own fact and deed only, and particularly against an infestment in favour of Janet Millar. In a question betwixt the parties, whether the warrandice was incurred, as there was no such infestment as the one described, but there was another in favour of Jean Webster, the Lords found that the warrandice was not incurred.

THE deceast Lesly of Glaswell having granted two bonds to the also deceast Ogilvie of Murthill, of the same date; there was a disposition granted by Murthill to Glaswell of some lands, with warrandice from fact and deed, and particularly against an infestment in favours of one Janet Millar, proceeding upon a bond granted by a former heritor. Upon a charge to make payment, Glaswell suspends, and withal raises a process of contravention of the warrandice, upon his being excluded from the mails and duties, by a liferent infestment in favours of one Jean Webster, granted by the former heritor to his own son, and this Jean Webster in conjunct-fee and liferent.

Alleged for the charger; That the infestment to be warranted from, was an infestment proceeding upon a bond to Janet Millar, her husband, and her heirs; whereas the infestment founded on by the suspender was a liferent infestment in favours of Jean Webster, proceeding upon a contract of marriage; and, therefore, since the description of the incumbrance, of which the lands were to be purged, did not agree with the nature of the sasine founded on, it was in vain to pretend that the charger ought to purge.

Answered for the suspender; That it was plain, *imo*, that an infestment was warranted against, which the disponent was expressly obliged to purge. *2do*, It did not appear that ever there was such an infestment as that mentioned in the clause of warrandice, in the person of one Janet Millar; it follows then, that the infestment founded on and produced by the suspender in favours of Jean Webster, granted by the then heritor of the lands, must be taken for that which was understood by the parties in the clause of warrandice; *ut plus valeat quod actum est, quam quod simulate concipitur*; since *falsa designatio*, or even *error in persona non nocet*, both which we are informed of in *l. 17. § 1. De Cond. et Dem.*

THE LORDS found, that the warrandice in the disposition by the charger's father to the defenders, was only against an infestment in favours of Janet Millar, proceeding upon a bond granted by the heritor of the lands, and the incumbrance not purged, founded upon by the suspender, was an infestment in favours of Jean Webster, proceeding upon a contract of marriage betwixt the heritor's son and her; therefore found the contravention of the warrandice not incurred.

Act. *Grahame.*Alt. *M'Dowal.*Clerk, *Sir James Justice.**Fol. Dic. v. 1. p. 294. Bruce, No 51. p. 65.*

1739. January 16.

REID *against* KER.

No 3.

AN adjudication against Patrick Livingstone of Barrouny, was found null on this ground, that the bill of adjudication was against John Livingstone; in so

much, that the adjudication was not even sustained as an interruption of the negative prescription, although it evidently enough appeared to have been only an escape in the writer who drew the bill of adjudication.

Fol. Dic. v. 3. p. 204. Kilkerran, (GROUNDS and WARRANTS.) No 1. p. 227.

No 3.

1743. July 5.

HAMILTON and BAIRD *against* HUNTER.

WHERE the bond of cautionry in a suspension referred to the bond charged on, as granted for the sum of 8000 merks in the year 1738, whereas the bond produced for the charger bore date in 1728, upon which ground the cautioner, at discussing, pleaded to be free, in respect no such bond was produced as that referred to in his bond of cautionry; the LORDS, after examining the doers for the parties, and the instrumentary witnesses to the bond of cautionry, found, 'That the bond of cautionry had only, through mistake, misrecited the bond charged on, and that the said misrecital in the bond of cautionry was not sufficient to liberate the cautioner.'

Fol. Dic. v. 1. p. 205. Kilkerran, (FALSA DEMONSTRATIO.) No 1. p. 188.

No 4.

A mistake in the bond of cautionry in a suspension, with regard to the date of the bond suspended, is not sufficient to liberate the cautioner.

1749. November 16.

JOHN DICKIE, Factor for the LORD FORBES of Pitsligo, *against* The KING'S ADVOCATE.

A CLAIM was presented in behalf of Alexander Lord Forbes of Pitsligo, for his estate, which had been surveyed by order of the Barons of Exchequer, as forfeited, for that he was not attainted.

Answered, He was attainted by act of Parliament, by the name of Alexander Lord Pitsligo, which was good.

Replied, The attainder cannot affect him, not mentioning him by his true title of Lord Forbes of Pitsligo.

Pleaded for the Claimant; The common law of England, by which this cause is to be tried, always required, that, in judicial proceedings, the party should be described by his true name: Further than which it was statute, 1st Hen. V. c. 5. that in every original writ of actions personal, appeals and indictments, and in which the exigent should be awarded, to the names of the defendant's additions should be made, which if it were not done, the outlawry to be pronounced on such writs, should be void. The claimant has no occasion to plead, that this statute extends to Parliamentary proceedings; as the defect here is not in an addition, but in his name; part of which the title of dignity of a peer, or person of inferior dignity makes, Coke, vol. 2. fol. 665. and 666. and vol. 4. fol. 363. And this name was so necessary, that if pending any action, the

No 5.

Alexander Lord Forbes of Pitsligo was attainted by the name of Alexander Lord Pitsligo. He claimed his estate as not forfeited, he not having been designed by his true name and title. The Court of Session sustained his claim; but the House of Lords reversed the judgment, as it was proved that he was commonly known by the title of Lord Pitsligo.